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OPINION AFTER TRANSFER FROM THE CALIFORNIA SUPREME COURT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, v. REGINALD MAKALEA GRAVELY et al., Defendants and Appellants.	D073591 (Super. Ct. No. SWF1300916)

APPEALS from judgments of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed and remanded with directions.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Reginald Makalea Gravely.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant Jamicia Nate Gravely.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Bernard Brown.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Eric A. Swenson, Kristine A. Gutierrez and Felicity Senoski, Deputy Attorneys General; Michael A. Hestrin, District Attorney and Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

A jury convicted codefendants Reginald Makalea Gravely, Jamicia Nate Gravely[1] and Anthony Bernard Brown of torture (Pen. Code,[2] § 206; count 1), kidnapping (§ 207; count 3), and robbery (§ 211; count 4). It found true an allegation that the robbery was in the first degree. It also convicted Reginald and Brown of attempted murder (§§ 664, 187, subd. (a); count 2) and found true an allegation that their conduct was willful, deliberate and premeditated.[3]

The court granted Reginald's section 1181 motion for a new trial on the attempted murder charge, concluding there was insufficient evidence he aided and abetted the codefendants in committing that crime. It sentenced Reginald to a determinate term of 3 years and a consecutive indeterminate term of 7 years to life in prison. It sentenced Jamicia to a determinate term of three years plus an indeterminate term of seven years to

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1 We refer to husband and wife Reginald and Jamicia by their first names to avoid confusion.

2 Undesignated statutory references are to the Penal Code.

3 The Riverside County District Attorney had also charged Jamicia with attempted murder. However, the court subsequently granted her section 1118.1 motion for a judgment of acquittal on that count.

life in prison. In bifurcated proceedings, the court found true Brown's prior convictions, and sentenced him to 39 years to life in prison as follows: On counts 1 and 2, seven years to life, doubled to 14 years to life, for a total of 28 years to life; on count 4, six years (the low term doubled). The court imposed an additional five years for his prior serious felony under section 667, subdivision (a).

Reginald contends: (1) the court erroneously instructed the jury regarding the natural and probable consequences doctrine as to the torture count; therefore, that conviction must be reversed; (2) his sentence on the kidnapping conviction must be stayed under section 654; and (3) we should remand the matter for the court to exercise its discretion to impose the determinate sentence on his robbery conviction concurrently with the indeterminate sentence on the torture conviction.

The district attorney appeals the order granting Reginald a new trial on the premeditated attempted murder conviction, arguing there was sufficient evidence corroborating the accomplice testimony.

Jamicia contends there was insufficient evidence to support her conviction for torture and kidnapping under theories of either aiding and abetting or natural and probable consequences. She specifically argues there was insufficient evidence she struck the victim with a bat or stick and alternatively, that action does not constitute

torture. She further contends the convictions violate her due process rights under the federal Constitution. She also joins in any relevant argument that Reginald raises.[4]

Brown contends insufficient evidence supports his conviction for attempted premeditated murder because the testimony of his accomplice, James Anderson, was uncorroborated.

This case is before us a second time. In our first opinion, we affirmed the judgments as to all defendants, but remanded for the trial court to resentence Reginald. Subsequently, Brown filed a petition for rehearing, requesting we remand the case for the trial court to exercise its discretion to resentence him under Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393), which had not yet gone into effect. We denied his petition. All parties petitioned for review in the California Supreme Court, which denied the petitions of Reginald and Jamicia. However, it granted Brown's petition, and transferred the matter to us with directions to vacate the decision and reconsider the cause in light of

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[4] Such a joinder argument is not proper. "It is not the task of the opposing party or this court to sort out what claims from the scores presented here are nonfrivolous as to the other defendants who did not identify with particularity the specific claims they wished to join. Clearly, neither the Attorney General nor this court is required to divine which aspects of a claim might be adverse to a particular defendant, rendering him unwilling to join the particular claim at issue. Appellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground. If a party's briefs do not provide legal argument and citation to authority on each point raised, " 'the court may treat it as waived, and pass it without consideration. ' " [Citation.] "Joinder may be broadly permitted [citation], but each appellant has the burden of demonstrating error and prejudice." (*People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 363-364.)

S.B. 1393. We do so in Section IV below and in the disposition and otherwise leave our original opinion substantially unchanged.

FACTUAL BACKGROUND

Prosecution Case

A. *Victim Testimony*

M.A. testified about the incident that occurred on December 28, 2012. He was 40 years old and residing in Hemet, California with a friend and her young son and daughter. He sometimes allowed the children to use his cell phone. That night, at around 10:00 o'clock, he received a telephone call from a woman, later identified as Jamicia, who he did not know. He asked her if they had met on a dating website, and Jamicia flirted with him and invited him to her house in Hemet, saying she was alone with her children. He went to her house around 10:45 p.m. and telephoned her to confirm he had arrived.

Jamicia invited M.A. inside and they flirted while they sat in the kitchen area and he drank one sip of beer that she had offered him. About two minutes later, she stood up and, addressing three men who appeared behind M.A., said, "Oh, I didn't know you guys were here." M.A. turned around and saw two men who he identified at trial as Reginald and Brown, and another man who he identified as "Anderson" (identified during trial as James Henry Anderson). M.A. did not know any of the men. They punched M.A. in the face multiple times. He tried to get out of the house but the men shoved him towards the garage and continued punching him. Anderson later put on gloves and he and Brown

beat M.A. some more. Reginald took out a ballistic vest and threatened that if M.A. brought anyone back to that residence, the vest would be waiting for M.A.

Brown used a machete to beat M.A., jab his sides and cut his arm and back. M.A. was bleeding and semi-kneeling on the garage floor and trying to block his genitals. After M.A.'s jacket and shirt became soaked in blood, the men put them in a bag. M.A. was stripped of his remaining clothes and belongings, including a one-dollar bill and his car keys, which he never got back. Brown took M.A.'s cell phone. Someone, who M.A. presumed was Brown, sprayed an aerosol can on M.A.'s face and lit the gas. It singed M.A.'s hair and started a fire that M.A. put out.

At one point, Reginald told the other men to let M.A. have some dignity. M.A. was allowed to put on his underwear, pants and footwear. The three men took M.A. to the bathroom and told him to wash himself up. While there, someone let out a pit bull dog. M.A. testified: "I don't know if they wanted [the dog] to attack me or what. But that pit bull just licked me. And then they pulled on it because it wasn't attacking me, I guess."

Reginald and Jamicia took M.A.'s driver's license. M.A. offered them his car in exchange for them sparing his life. They returned the license to him, saying that they had photocopied it. Jamicia and Reginald brought out their children, including a daughter between eleven and thirteen years old, who M.A. said he had recognized from when she had slept over at his roommate's house with his roommate's daughter. Reginald seemed

surprised at that, and he told M.A. not to tell his roommate or anyone else about the incident. M.A. agreed he would not and begged them to let him go.

M.A. was taken back to the garage, where Jamicia hit him on his back with either a baseball bat or a pole "at least three to four times." M.A. was unable to react, as he was "trying not to pass out." Reginald told M.A. to relax and that he would take him home. For about an hour, no one attacked M.A. physically, although Brown and Anderson were still in the garage with him. He knelt in the garage in pain and bleeding. He was hoping not to fall asleep and "trying to still figure a way to get out of there."

Brown wrapped black tape around M.A.'s head, eyes, nose, shoulders and also his arms, which were pressed towards his body and with his palms facing inwards on his legs. M.A. tried removing the tape from around his nose to help him breathe but someone wearing steel-toed boots, who he believed to be Brown, kicked him in the ribs. Immediately afterwards, M.A. was thrown into the trunk of a vehicle, which moved rapidly. M.A. did not think he was going home; rather, because of the fact he had been bound with tape, he thought they were going to "get rid of him."

M.A. managed to remove the tape from his eyes, and he realized he was in his vehicle's trunk, which he opened. When the vehicle pulled over, he jumped out. He tried going to the front of his vehicle but another car swerved towards him, and he felt it was trying to kill him. Therefore, to get away, he jumped down a cliff. It was dark outside and he hid to save his life. When the sun began to rise, M.A. pushed himself to climb up the hill to reach the roadway. At about 8:30 a.m., he saw a Riverside County Sheriff's

Department community service officer's vehicle, which he flagged down. He told the officer that his assailants had tried to kill him. Police later found black electrical tape in the trunk of M.A.'s car.

M.A. was taken to the emergency room. M.A.'s treating trauma surgeon testified he conducted a physical exam and concluded M.A. had black eyes, an eye that did not move that well, a bleeding nose, chest pain, and scrapes all over his body. X-rays and CAT scans showed M.A. was suffering from extensive facial fractures on both sides of the face, including the jawbone, and his face was "no longer affixed to the skull." M.A. also had three broken ribs. Two surgeons performed complex facial surgery on M.A., inserting more than four small titanium plates to help the fractured bones heal. M.A. stayed at the hospital for 14 days. At the time of trial, M.A. still had problems with his eyes, which are very sensitive to sunlight; moreover, his night vision has deteriorated.

M.A. correctly identified Jamicia, Reginald and Brown in different photographic lineups. However, he did not correctly identify Anderson. At trial, M.A. denied he had gone to Jamicia's house to see her daughter.

B. *Anderson's Accomplice Testimony*

Anderson, Jamicia's father, was jointly charged with the other codefendants but pleaded guilty to kidnapping M.A. In exchange, he testified against them and faced a possible 12-year prison term. He had not yet been sentenced when he testified at trial.

Anderson testified he had been living with Jamicia and Reginald. On the night of the incident, Brown came to visit and drank beers with Reginald and Anderson in the

garage. Jamicia went to the garage and afterwards spoke privately with Reginald. Reginald recounted to Anderson and Brown that a man was coming to the house to visit Reginald's daughter. The three men discussed the matter and all of them became upset at that and they therefore decided that if he showed up, they would let him know such conduct was not right and send him on his way.

Some minutes later, Jamicia told the men that M.A. had arrived at the house. The men waited in the garage for a short while before going into the living room. Anderson immediately punched M.A., knocking him off a barstool. Next, Reginald jumped on M.A. and started punching him. M.A. moved away from the front entrance where Anderson was standing, and left the living room saying, "No, no, no, stop, stop." M.A. ended up in the garage, where Anderson punched him in the jaw. Anderson decided he was finished with M.A. and went to work on a car in the garage. Anderson and Reginald warned M.A. not to tell anybody what they had done to him.

Anderson heard M.A. begging and "mewling," "Ooh, ooh, stop." Anderson saw Brown use a machete found in the garage to poke M.A., who was bleeding. While M.A. was naked, Brown lit carburetor liquid near M.A.s face, singeing M.A.'s eyebrows. Anderson testified Brown was wearing white tennis shoes that night.

Anderson calculated M.A. was at the house for about four hours, after which Anderson helped him clean himself in the bathroom and sent him back out. About two minutes afterwards, Anderson was cleaning the bathroom when Reginald told him, "Stay right here, Pops, we'll be right back." Anderson later saw that everyone had left the

garage and assumed Brown and Reginald had taken M.A. home. Anderson assumed Jamicia was inside the house because he heard music coming from there.

After about 40 minutes, Reginald, Brown and a family friend, identified only by his first name, "Alfonso," entered the garage. Anderson was surprised to hear them saying they had put M.A. in the trunk of a vehicle and gone up a mountain in order to push the car and M.A. off a cliff. They said Alfonso was driving a car that followed M.A.'s car. Their scheme was foiled when M.A. got out of the trunk and jumped off the cliff.

When initially arrested and interrogated about the incident, Anderson lied to police, saying he was not at the house when the incident occurred. He later informed investigators about his participation in it. Anderson subsequently wrote the district attorney a letter requesting leniency in exchange for his truthful trial testimony.

Defense Case

Reginald testified as an accomplice that Jamicia went to the garage that night, took him aside and told him that a "grown man" was trying to contact their daughter by phone and was coming to the house that night. Reginald returned to the garage, where he had been drinking beers with Brown and Anderson. Brown was wearing "some kind of medical boot." Reginald decided that if the man came, he was "going to just teach him a lesson, beat him up." Jamicia later went to the garage and told Reginald M.A. had arrived. About two minutes later, Reginald, Anderson and Brown entered the house. Anderson knocked M.A. off the chair. Reginald punched M.A. in the face about five

times, asking him, "You think you're coming over here and fuck with a little girl?" Reginald testified he did not hit M.A. further. When M.A. stood up and started to leave, Anderson blocked his path and therefore M.A. ended up in the garage, where Anderson continued to punch him. Anderson told M.A. to empty his pockets, and he complied. Reginald saw M.A.'s address on his I.D. card and warned him against returning to the house to see his daughter.

Reginald went inside the house and talked with Jamicia. When he returned to the garage, M.A.'s face looked like "it was beaten to a pulp." M.A. was kneeling and naked. Reginald was shocked and upset and allowed M.A. to put on his clothes. Reginald told M.A. he would be taken home. Reginald owned a ballistics vest and showed it to M.A. that night, warning him that if he returned they would be ready for him. Reginald went back inside the house. When he returned to the garage, nobody was there. He therefore believed the others had taken M.A. home.

About 30 minutes later, when it was about 1:00 or 2:00 a.m., Anderson, Alfonso and Brown returned to the house. To Reginald's surprise, they said M.A. had escaped from the trunk. Anderson said they had intended to leave M.A. on the side of the road. Reginald initially lied to police, saying he was not at home when the incident occurred.

DISCUSSION

I. *Reginald's Appeal*

A. *The Torture Conviction and Natural and Probable Consequences Theory*

Reginald contends we must be reverse his torture conviction because the court

instructed the jury with modified versions of CALCRIM Nos. 403[5] and 417[6] that he could be convicted based on the natural and probable consequences doctrine. He claims

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[5] The court instructed the jury with this version of CALCRIM No. 403: "To prove that the defendant is guilty of Count one, torture (or the lesser included offenses of assault with force likely to cause great bodily injury or simple assault), Count three, kidnapping (or the lesser included offense of false imprisonment) or Count Four, robbery (or the lesser included offense of petty theft) the People must prove that: [¶] 1. The defendant is guilty of assault; [¶] 2. During the commission of assault a coparticipant in that assault committed the crime or crimes of torture (or the lesser included offenses of assault with force likely to cause great bodily injury or simple assault), kidnapping (or the lesser included offense of false imprisonment) and/or robbery (or the lesser included offense of petty theft) [¶] AND [¶] 3. Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of the torture (or the lesser included offenses of assault with force likely to cause great bodily injury or simple assault), kidnapping (or the lesser included offense of false imprisonment) and/or robbery (or the lesser included offense of petty theft) was a natural and probable consequence of the commission of the assault. [¶] A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. To decide whether torture (or the lesser included offenses of assault with force likely to cause great bodily injury or simple assault), kidnapping (or the lesser included offense of false imprisonment) and/or robbery (or the lesser included offense of petty theft) were committed, please refer to the separate instructions that I will give you on that crime. The People are alleging that the defendant originally intended to aid and abet an assault. If you decide that the defendant aided and abetted one of these crimes and that torture (or the lesser included offenses of assault with force likely to cause great bodily injury or simple assault), kidnapping (or the lesser included offense of false imprisonment) and/or robbery (or the lesser included offense of petty theft) was a natural and probable consequence of that crime, the defendant is guilty of torture (or the lesser included offenses of assault with force likely to cause great bodily injury or simple assault), kidnapping (or the lesser included offense of false imprisonment and/or robbery (or the lesser included offense of petty theft). You do not need to agree about which of these crimes the defendant aided and abetted."

that following the California Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155, those instructions were erroneous. He argues: "The culpability for torture is based on particular mens rea—choosing to cause cruel or extreme pain—that is above and beyond the harm of inflicting great bodily injury. As a result, a non-perpetrator cannot be guilty of torture unless they share this particular mens rea and the natural and probable consequence theory of aider and abettor liability does not apply." Acknowledging that this court's decision in *People v. Flores* (2016) 2 Cal.App.5th 855,

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6 The court instructed the jury with this version of CALCRIM No. 417: "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime. [¶]
A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan. [¶] To prove that the defendant is guilty of the crimes charged in Counts 1 and its lessers, Count 3 and its lesser, and Count 4 and its lesser, the People must prove that: [¶] 1. The defendant conspired to commit one of the following crimes: Assault; [¶] 2. A member of the conspiracy committed Torture, Kidnapping, Robbery, Assault with Force likely to produce great bodily injury, Simple Assault, False imprisonment, or petty theft to further the conspiracy; [¶] AND [¶] 3. Torture, Kidnapping, Robbery, Assault with Force likely to produce great bodily injury, Simple Assault, False imprisonment, or petty theft were natural and probable consequences of the common plan or design of the crime that the defendant conspired to commit. [¶] The defendant is not responsible for the acts of another person who is not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy. [¶] A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy had been accomplished."

869-870 declined to extend the holding in *Chiu* to the crime of torture, Reginald contends *Flores* was wrongly decided.

We review claims of instructional error de novo. (*People v. Waidla (*2000) 22 Cal.4th 690, 733; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) We must ascertain the relevant law and determine whether the given instruction correctly stated it. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

An aider and abettor may be convicted for crimes committed by the direct perpetrator under two alternative theories: direct aiding and abetting principles and the natural and probable consequences doctrine. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Under direct aiding and abetting principles, the defendant is guilty of the intended offense if he or she acted with knowledge of the direct perpetrator's criminal purpose, with an intent or purpose either to commit, encourage or facilitate commission of the target offense. (*Id.* at p. 1118.)

Alternatively, an aider and abettor may be found "guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime." (*People v. Smith* (2014) 60 Cal.4th 603, 611.) " '[A] person who aids and abets the commission of a crime is a "principal" in the crime, and thus shares the guilt of the actual perpetrator.' " (*Ibid.*) Liability of an aider and abettor is imposed under the natural and probable consequences doctrine if " ' "a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable

consequence of the act aided and abetted." ' " (*Ibid.; People v. Prettyman* (1996) 14 Cal.4th 248, 269 [close connection required between the target crime aided and abetted and the collateral offense actually committed].)

"For a criminal act to be a 'reasonably foreseeable' or a 'natural and probable' consequence of another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530 (*Nguyen*).) "The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.] . . . [T]he issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Id.* at p. 531.)

Depending on the sequence of events that is unfolding, "[a] person may aid and abet a criminal offense without having agreed to do so prior to the act." (*Nguyen*, *supra*, 21 Cal.App.4th at p. 531.) All the circumstances that led up to a participant's last act of aiding or encouraging the principal actor in committing the target offense must be

considered when determining whether the collateral criminal offense was reasonably foreseeable to that participant. (*Id.* at p. 532.)

In *Chiu, supra,* 59 Cal.4th at pages 158-159, the court addressed whether an aider and abettor who knew of and intended to facilitate a target offense (i.e., assault or disturbing the peace) could be convicted of the nontarget offense of premeditated murder under the natural and probable consequences doctrine, where the direct perpetrator had committed premeditated murder. Noting that the natural and probable consequences doctrine is not expressly enunciated in California's statutory scheme (e.g., § 31), the extent of aiding and abetting liability for a particular offense should be determined by the courts by "keeping in mind the rational function that the doctrine is designed to serve and with the goal of avoiding any unfairness which might redound from too broad an application." (*Chiu, supra,* at p. 164.) As a matter of first impression, the court in *Chiu* concluded that under the natural and probable consequences doctrine, an aider and abettor cannot be convicted of the nontarget offense of first degree premeditated murder. (*Id.* at pp. 163-168.) The court limited its holding to the issues surrounding premeditated first degree murder. (*Id.* at pp. 158-159, 166-167.)

Our decision in *People v. Flores, supra,* 2 Cal.App.5th 855 controls this case. The appellant there relied on *People v. Chiu, supra,* 59 Cal.4th 155 for his argument the court's instructions were prejudicially erroneous in part because they permitted the jury to convict him of the nontarget offense of torture if it concluded the torture by his girlfriend was a natural and probable consequence of the felony child abuse that he had aided and

abetted. (*Flores,* at p. 866.) We reviewed the *Chiu* case and concluded it "is limited to an aider and abettor's liability on a natural and probable consequences theory for first degree murder, and the animating concerns of *Chiu* are not sufficiently analogous to extend its application to an aider and abettor's liability on a natural and probable consequences theory for torture." (*Flores,* at p. 869.) We pointed out: "First degree murder, apart from the felony-murder variety, requires both that the direct perpetrator acted with the specific intent to kill and that the direct perpetrator acted willfully, deliberately and with premeditation." (*Ibid.*) However, the accomplice's actions are not excused as he may be held liable for the perpetrator's commission of the nontarget offense of second degree murder. (*Ibid.*) We added: "[T]he crime of torture is akin to the crime of second degree murder and imposes punishment when the perpetrator causes a harm and has a specific mental state. Moreover, torture is not divided into degrees in which a uniquely subjective or personal intent element elevates the punishment above that imposed for a lesser form of torture." (*Id.* at p. 870.) We held that "because *Chiu* approved liability for an aider and abettor for second degree murder under the natural and probable consequences doctrine, and the policy factors that animated *Chiu* to disapprove first degree murder culpability lack sufficient analogues to extend *Chiu* to aider and abettor liability for torture under the natural and probable consequences doctrine, the court did not err in instructing the jury on aider and abettor liability." (*Flores, supra,* at p. 870.) In light of the state of the evidence as set forth above, we conclude that under *Flores*, the trial court here did not err by instructing the jury with CALCRIM Nos. 403

and 417 regarding the natural and probable consequences doctrine as to the torture charge.

B. *The Sentence on Reginald's Kidnapping Conviction*

Reginald contends that his sentence on the kidnapping conviction must be stayed under section 654 because that crime was committed to facilitate the crime of torture for which he was separately sentenced. Reginald points out the People had argued in favor of such a stay and, in fact, the court stayed the sentences on Jamicia's and Brown's kidnapping convictions. Reginald also points out that he asked the court at sentencing if the "kidnapping charge is running concurrent for [section] 654," and the court answered in the affirmative.

The Attorney General concedes, and we agree, there is no substantial evidence that Reginald harbored a separate intent and objective for kidnapping; rather, the kidnapping was the means of committing torture. "Section 654 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Accordingly, Reginald's kidnapping conviction must be stayed. (§ 654.)

C. *The Sentence on Reginald's Robbery Conviction*

Reginald contends we should direct the trial court to exercise its discretion to resentence him and decide whether to impose the determinate sentence on the robbery conviction concurrently with the indeterminate sentence on the torture conviction. The Attorney General contends no remand is necessary as the trial court's sentence was lower

than the probation department's recommended sentence, there is no evidence the court was unaware of its discretion, and it likely would not change its sentence.

At sentencing, the court made general remarks before denying probation: "And looking at the facts of this case, the violence, torture, [Reginald] was a direct participant involved in the viciousness of this incident. . . . The Court finds the nature and circumstances of the crime, as compared to other instances of the same crime, [M.A.] was extremely vulnerable, [Reginald] inflicted physical or emotional injury, multiple facial fractures, in the hospital for two weeks. And [Reginald] was an active participant. There was a degree of sophistication and professionalism in the plan arrived at."

The court then imposed sentence as follows: "The indeterminate term or sentence under Count 1 [torture] is seven [years] to life. The court will select, based upon consideration of the aggravating and mitigating circumstances—and the Court does note the aggravating and mitigating circumstances in the probation report—great violence, threat of harm, great bodily harm, the defendant induced others to participate in the commission of the crime, and the manner—sophistication of the crime. [¶] The Court also considers the rules in mitigation and puts a significant degree in the mitigating circumstances of his insignificant record on prior crimes, and therefore chooses the low term under count 3 [kidnapping] and 4 [robbery], but will run 3 and 4 concurrent with each other. [¶] So a determinate term of three years and an indeterminate term [of] seven years to life consecutive." When Reginald's counsel sought clarification of the sentence,

the court explained that the two determinate counts would run concurrent to each other, but "have to" run consecutive to the indeterminate term.

Under section 669, "When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

Defendants are entitled to sentencing decisions made in the exercise of the court's "informed discretion." (See *United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741.) A court that is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record. (See *People v. Ruiz* (1975) 14 Cal.3d 163, 168.) The court's statement that Reginald's sentence on the determinate counts would "have to" run consecutive to the indeterminate term suggests the court was unaware of its discretion to impose a concurrent term. (Accord, *People v. Deloza* (1998) 18 Cal.4th 585, 600.) Because it is unclear to us the extent to which the trial court's sentencing decision was affected by its misunderstanding of its discretion, we remand the matter for the court to revisit the issue of whether to impose a concurrent or consecutive sentence in light of its discretion and resentence Reginald based on proper criteria. (*People v. Leon* (2016) 243

Cal.App.4th 1003, 1023 [" 'Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' "].) We express no opinion on how the court should exercise its discretion.

II. *The District Attorney's Appeal of the Order Granting Reginald a New Trial*

The district attorney contends the court erroneously granted Reginald a new trial as there was sufficient corroborating evidence establishing Reginald's motive and opportunity to commit attempted murder or his direct involvement in that crime. Specifically, the district attorney points to M.A.'s testimony corroborating Anderson's account of the beating that started inside the house, Reginald joining in the beating, Brown's use of a machete, a lighter and aerosol can, and M.A. being stripped naked and later taken to clean himself in the bathroom.

At the outset of the hearing on Reginald's new trial motion, the court stated its specific concerns: "[T]he jury was not instructed under [the] natural and probable consequence doctrine that pertains to the attempted murder. So it has to be aiding and abetting directly and a direct and ineffectual step toward completion of the crime . . . . [¶] And with respect to that count, recognizing under [section] 1111 that you have to have corroboration of testimony of a codefendant essentially or an accessory to the crime, which we have as a matter of law that—Mr. James Anderson was essentially an accessory or equally culpable for the greater crimes. And independent of his testimony—

because my recollection of the facts of the case is that only Mr. Brown was identified as prepping [M.A.] for transport, so to speak, in the car. [¶] Obviously, there was no specific act done towards actually—the direct and ineffectual act would be throwing [M.A.] in the trunk and driving him up there. But there was no one ever identified by the victim as to who was involved in that subsequent act. Only the victim was able to identify Mr. Brown as deemed part of that subsequent action. And only—the only statement about—that there was a plot or plan was from the testifying codefendant."

The court next asked the prosecutor to point to evidence independent of the codefendant's testimony. The prosecutor responded: "[W]e have the fact it's [Reginald's] home. We have the fact that is undisputed that he was one of the men who was assaulting, coming after [M.A.], who was threatening him, who was there when various acts were done, who had showed him his daughter, and the fact that also that we have two cars, even from [M.A.'s] own statement, that went up that mountain, further showing it wasn't just one man who was responsible for this, it's multiple. And when you have multiple men—three men in that garage, two cars up there, the jury had sufficient evidence to find that not only the attempted murder occurred, but that [Reginald] was the person who did it."

The court was unpersuaded by that response and granted Reginald's new trial motion: "The court feels that there was insufficient evidence to be upheld by the Court of Appeal as it pertains to [Reginald]; that there is insufficient evidence to corroborate him being involved [in the attempted murder]. [¶] . . . [T]he only evidence that there was, in

the court's opinion, because of the fact that there were multiple individuals involved—it could have been Mr. Anderson, Mr. Brown involved in that. There was insufficient evidence other than a testifying accomplice in this matter to support a conviction."

On a motion for a new trial on grounds that a verdict is contrary to the evidence (§ 1181, subd. (6)), a trial court "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt to the judge, who sits, in effect, as a '13th juror.' [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to the . . . evidence.' [Citations.] In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133-134, italics omitted; see *People v. Fuiava* (2012) 53 Cal.4th 622, 729-730 [though guided by a presumption of the verdict's correctness and proceedings, in reviewing a motion for new trial the trial court must consider the proper weight to be accorded the evidence and then decide whether or not there is sufficient credible evidence to support the verdict]; *People v. Lewis* (2001) 26 Cal.4th 334, 364 [same].)

" ' "The determination of a motion for new trial rests so completely within the [trial] court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) "Such an abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard." (*People v. Knoller* (2007) 41 Cal.4th 139, 170.) " ' "[I]n determining whether there has been a proper

exercise of discretion on such motion, each case must be judged from its own factual background." ' " (*Delgado,* at p. 328.)

"In reviewing an order granting a new trial based on insufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the trial court's ruling, drawing all factual inferences that favor the trial court's decision. [Citations.] The trial court's factual findings, express or implied, will be upheld if supported by any substantial evidence. [Citation.] The order will be reversed only if it can be said as a matter of law that there is no substantial evidence to support a judgment contrary to the verdict." (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252, fn. omitted.)

Section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Although corroborating evidence is required, it " 'may be slight, entirely circumstantial, and entitled to little consideration when standing alone. [Citations.] It need not be sufficient to establish every element of the charged offense or to establish the precise facts to which the accomplice testified. [Citations.] It is "sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." ' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 95.) The corroborating evidence must tend to connect the defendant with the crime, " ' "without aid from the accomplice's testimony." ' " (*People v. Williams* (2013) 56 Cal.4th 630, 679.)

The district attorney refers to evidence pointing to the parties' actions at the start of their attack of M.A., but those relate to the kidnapping and torture crimes rather than to the acts establishing Reginald's purported participation in the later attempted murder. The nonaccomplice testimony in this case established only that Reginald had a general connection to the other perpetrators. They drank before the attack, joined in the attack, and reunited in his garage after the attempted murder. While "[t]he relationship of the men and all of their acts and conduct may be considered in determining whether there are corroborating circumstances" (*People v. Henderson* (1949) 34 Cal.2d 340, 343), here there was no evidence about Reginald's specific acts or conduct, except that he was with the other perpetrators hours before and after the attempted murder. (See, e.g., *People v. Lloyd* (1967) 253 Cal.App.2d 236, 241-242 [defendant's physical presence with narcotics, in the presence of accomplice who was a "narcotic violator" was not sufficient corroboration; proof of mere presence at scene and opportunity to commit offense are not sufficient on their own].)

In this case, there was no evidence corroborating Anderson's accomplice testimony on the attempted murder. The evidence the district attorney cites did not tend to connect Reginald to the attempted murder in such a way that it could reasonably satisfy the jury that the codefendants were telling the truth about Reginald's involvement in it. Specifically, there was no evidence from any source about Reginald's involvement in the preparation or transporting of M.A. to the mountains. M.A. did not testify Reginald was involved in blindfolding him. Once blindfolded, M.A. did not see who put

him in the car or drove him to the mountains. We conclude there is no basis for disturbing the trial court's grant of Reginald's new trial motion.

III. *Jamicia's Appeal of Her Torture and Kidnapping Convictions*

Jamicia contends there was insufficient evidence to support her convictions for torture and kidnapping either as a direct perpetrator or under the natural and probable consequences theory; therefore, her constitutional rights to due process and a fair trial were violated. Jamicia points out that the only testimony that she hit M.A. with a bat or stick came from M.A. She claims that police did not find a baseball bat in her home, and although one was found in Brown's garage, no evidence connected her to that bat. She further argues Reginald testified Jamicia did not strike M.A. She alternatively argues that even if M.A.'s testimony is credited, hitting him with a bat or stick does not constitute torture.

Section 206, defining the crime of torture, provides: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain." Thus, "torture has two elements: (1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223.)

When evaluating a challenge to the sufficiency of the evidence, our role is limited. We " 'must "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury.' " (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 468.) We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence (*People v. Davis* (1995) 10 Cal.4th 463, 509), and we may not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Green* (1997) 51 Cal.App.4th 1433, 1437.) "Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it." (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.)

The first element of torture requires evidence Jamicia intended to inflict extreme or severe pain. (*People v. Burton* (2006) 143 Cal.App.4th 447, 452.) The courts have recognized that "[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense" (*People v. Pre* (2004) 117 Cal.App.4th 413, 420), and "[a]bsent direct evidence of such intent, the circumstances of the offense can establish the intent to inflict extreme or severe pain." (*Burton*, at p. 452.)

A jury may consider all of the circumstances (*People v. Misa* (2006) 140 Cal.App.4th 837, 843), including the severity of the injuries (*Burton*, at p. 452) to determine whether the defendant intended to inflict cruel or extreme pain.

We reject Jamicia's contention that M.A.'s testimony was insufficient to support her conviction. Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) We point out that in challenging the torture conviction, Jamicia only mentions testimony relating to her hitting M.A. with the bat or stick at least three or four times. Her blows followed the injury the others had inflicted on M.A. and therefore they prolonged M.A.'s suffering. However, M.A. also testified she held the pit bull that approached him while he was in the bathroom cleaning himself up.

Even more, under the aiding and abetting theory, the jury could reasonably conclude that Jamicia was responsible for all the injuries that M.A. suffered up to the point just before he was bound and removed from her home. A jury could reasonably conclude that she started the night's incident by luring M.A. to her house for him to be beat. She informed her husband that M.A. was coming to meet their young daughter. When M.A. confirmed his arrival, Jamicia alerted her husband about that. The jury reasonably could conclude she knew her actions would cause the violent reaction that ensued. Further, there is no evidence she did anything to stop any of the harm her father, husband and friend inflicted on M.A. during the applicable period. The treating surgeon

testified about the harm inflicted on M.A., and the complex surgery he performed on him. M.A. also testified about the length of time he had to recuperate before he could return to work, and the ongoing deteriorated eyesight he suffered at the time of trial.

In sum, the record shows Jamicia flirted with M.A., thus encouraging him to go to her house. She offered him a beer that put him at ease. She coordinated with her husband and intended to cause him cruel or extreme pain to revenge for his supposedly contacting her minor daughter. And M.A. did experience great bodily injury, as the treating surgeon testified. Thus, sufficient evidence shows Jamicia intended to promote and instigate the crime of torture.

As for her claim of insufficiency of evidence to support the kidnapping conviction, Jamicia does not develop it with reasoned arguments in her appellate briefs as required by California Rules of Court, rule 8.204 (a)(1)(B), and we may therefore treat the claim as forfeited. In any event, the claim fails on the merits. The court instructed the jury with CALCRIM No. 1215 regarding the elements of kidnapping: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] 3. The other person did not consent to the movement; [¶] AND [¶] 4. The defendant did not actually and reasonably believe that the other person consented to the movement. [¶] In order to consent, a person must act freely and voluntarily and know the nature of the act. [¶] Substantial distance means more than a

slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the distance the other person was moved was beyond that merely incidental to the commission of the other charged crimes, whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection." (Accord, *People v. Jones* (2003) 108 Cal.App.4th 455, 462, fn. omitted.)

Under the aiding and abetting theory, Jamicia participated in the kidnapping because she knowingly lured M.A. into the house. The men did not permit M.A. to leave. Rather, they moved him into the garage and kept him there against his will for approximately four hours. The record does not show Jamicia did anything to call the authorities or to stop the men from inflicting further physical and psychological harm on M.A.

IV. *Brown's Appeal of His Attempted Murder Conviction*

A. *Sufficiency of the Evidence Claim*

Brown contends there was insufficient evidence to support his conviction for attempted premeditated murder because Anderson's accomplice testimony was not corroborated; thus, his conviction violates his rights under the due process clauses of the federal and state Constitutions.

" 'The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.]' [Citation.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] Hence, in order for defendant to be convicted of the attempted murder of the [victim], the prosecution had to prove he acted with specific intent to kill that victim." (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

Intent to kill and express malice are, for purposes of this discussion, essentially the same mental state. (*People v. Smith, supra,* 37 Cal.4th at p. 739.) Express malice requires a showing that the assailant either desires the victim's death or knows to a substantial certainty that it will occur. (*Ibid*.) Intent to kill or express malice may in many cases be inferred from the defendant's acts and the circumstances of the crime. (*Id.* at p. 741.) " 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' " (*Id.* at p. 742.)

The law regarding the need for corroboration of accomplice testimony is set forth above and we need not repeat it here. We conclude there was sufficient corroborating testimony to support Brown's conviction for attempted murder. M.A. testified Brown participated in torturing him by cutting him in the back with a machete and singeing his hair. Brown also robbed M.A., bound him with tape and kicked him when he tried to

take it off. The jury could reasonably infer that Brown's motive to kill M.A. was his perception M.A. had gone to the house to meet a child. Brown later developed an additional motive to kill M.A., which was to prevent M.A. from remembering him and recounting to police Brown's criminal actions that night. Moreover, M.A. would not know exactly who were involved in the further actions of putting him in the trunk, transporting him to the cliff and pushing the car over. For that reason, Brown insisted on covering M.A.'s eyes and nose with tape and punishing M.A. for taking off the tape by kicking him.

The fact Brown taped M.A.'s shoulder and arms to his side before M.A. was placed in the trunk of the car gives credence to Anderson's and Reginald's accomplice testimony that the men intended to kill M.A. It was a minimum requisite step in that direction as they sought to immobilize him to prevent him from escaping from the trunk, thus ensuring his demise when they pushed his vehicle over the cliff.

Brown's sufficiency of the evidence claim rests on the fact M.A. testified he could not see who put him in the vehicle's trunk and drove him to the mountains. Brown concludes that, on this record, no evidence showed his involvement in the attempted murder. However, we conclude Brown's analysis is flawed because he assumes the attempted murder started at a later point in the night's events than warranted. Crediting M.A.'s testimony that Brown bound him with the tape and kicked him when he tried to remove it, the jury could have concluded that those acts sufficed to support the attempted murder conviction, as they were direct but ineffectual acts toward accomplishing the

intended murder of M.A. The police later found electrical tape in the vehicle, thus corroborating M.A.'s testimony on that point.

Brown also relies on the discrepancy in the witnesses' identification of the footwear he wore that night and argues that insufficient evidence supported his conviction for attempted murder. Specifically, M.A. testified Brown wore a steel toed boot, Anderson testified Brown wore white tennis shoes, and Reginald testified he wore medical boots. However, under the standard of review, it was for the jury to reconcile the witnesses' inconsistent testimony. The court instructed it with CALCRIM No. 228: "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently." The court also instructed the jury with CALCRIM Nos. 302, 303, 315, 316 and 318, which set forth other criteria for evaluating witness credibility. The jury reasonably could conclude that notwithstanding the discrepancy in testimony regarding Brown's footwear, based on the totality of the circumstances and the fact M.A. had spent enough time in his presence during that night, M.A. correctly identified Brown as the one who bound him with tape and kicked him when he tried to take off the tape. Accordingly, we do not disturb the jury's verdict on the attempted murder count.

B. *S.B. 1393 Claim*

Brown contends we should remand the matter for the trial court to exercise its discretion to resentence him on his prior strike conviction in light of S.B. 1393 in the "furtherance of justice." The People do not oppose the request.

On September 30, 2018, the Governor signed S.B. 1393 which, effective January 1, 2019, amends sections 667 subdivision (a) and 1385 subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the former versions of these statutes, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)), and the court has no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

During the pendency of this appeal, our colleagues in Division Two decided *People v. Garcia* (2018) 28 Cal.App.5th 961, which holds S.B. 1393 is retroactive. In that case, as here, the People have conceded that S.B. 1393 applies retroactively. (*Garcia*, at p. 973.) The *Garcia* court ruled that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended S.B. 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when S.B. 1393 [became] effective on January 1, 2019." (*Garcia*, at p. 973; accord, *In re Estrada* (1965) 63 Cal.2d 740, 744-745 ["If the amendatory statute lessening punishment becomes

effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."]; *People v. Conley* (2016) 63 Cal.4th 646, 657 ["The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not."].) We agree with the *Garcia* court's analysis*;* accordingly, we follow it and remand this matter for the trial court to exercise its discretion as to whether to resentence Brown.

DISPOSITION

The court is directed to resentence Reginald Makalea Gravely on the robbery conviction consistent with this opinion; it shall also amend Reginald's abstract of judgment to reflect the resentencing and a stay on his sentence on the kidnapping conviction under section 654, and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. Further, Anthony Bernard Brown's sentence is vacated and the court is directed to permit Brown to bring a motion to dismiss the serious felony prior conviction (section 667, subdivision (a)) in light of S.B. 1393, and to exercise its discretion as may be appropriate. If the prior conviction is dismissed the court shall resentence Brown accordingly. If the prior conviction is not dismissed the previous sentence shall be reinstated. In all other respects, the judgments are affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.